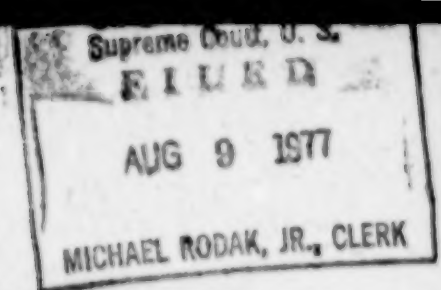


No. 76-1643



In the Supreme Court of the United States

OCTOBER TERM, 1977

**SAMUEL D. MAGAVERN, AS EXECUTOR AND TRUSTEE
OF THE LAST WILL AND TESTAMENT OF
MARGARET C. DUNCAN, DECEASED, PETITIONER**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Petitioner is the trustee of a trust established under the will of Margaret C. Duncan, who died in 1965, leaving the residue of her estate in trust "for the benefit of the family group consisting of * * * my husband, Matthew Duncan, my son, Thomas W. Doran, his children, and the issue of his children." The will directed that the "Trustee shall pay over or use * * * whatever part or all of the net income or principal * * * he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group." During the years 1968-1973, petitioner paid out from the trust to Mrs. Duncan's son, Thomas W. Doran, amounts that averaged slightly more than \$2,000 per year (Pet. App. 6a, 12a).

During the period 1965-1971, Doran was deficient in the payment of federal taxes, and there were assessed against him taxes and interest in excess of \$112,000. In November 1974, a total of more than \$108,000, plus penalties and interest, remained unpaid (Pet. App. 5a, 23a). On December 5, 1973, the Internal Revenue Service, pursuant to its authority under Sections 6321 and 6331 of the Internal Revenue Code of 1954 (26 U.S.C.), served upon petitioner a notice of levy upon "all property and rights to property" belonging to Doran. Petitioner refused to honor the levy upon the asserted ground that under the terms of the trust Doran had no rights in the trust property. Petitioner made no further payments to Doran from trust proceeds after the date of the notice of levy, and Doran died on February 19, 1975 (Pet. App. 6a, 23a).

In June 1974, petitioner instituted a proceeding in Surrogate's Court, Erie County, New York, seeking a determination of the effect and validity of the notice of levy served upon him. The government appeared specially in that proceeding to contest the court's jurisdiction. The Surrogate's Court conceded that it was without jurisdiction with respect to the levy. It nevertheless purported to construe the trust, and ruled that Doran had no property or rights to property in the trust (Pet. App. 6a-7a, 24a-25a, 31a-38a). In August 1974, petitioner instituted this wrongful levy action under 26 U.S.C. 7426(a)(1) in the United States District Court for the Western District of New York, seeking to enjoin enforcement of the levy. The government counterclaimed for an order foreclosing its tax liens and requiring petitioner to pay over all money and property due to Doran by virtue of his interest in the trust (Pet. App. 7a, 23a).

After paying "proper regard" to the ruling of the Surrogate's Court (*Commissioner v. Estate of Bosch*, 387 U.S. 456, 465), the district court found that under controlling

decisions of the New York Court of Appeals, Doran had a right to property in the trust because he could have compelled distributions to himself (Pet. App. 22a-30a). The parties thereafter stipulated that the amount reached by the levy and necessary to satisfy it was \$2,305.50 (Pet. App. 5a, 6a). The court of appeals affirmed, with one judge dissenting (Pet. App. 4a-21a).

1. The decision below was correct. Whether Doran had such "property and rights to property" in his mother's testamentary trust as to make it subject to lien and levy under Sections 6321 and 6331 is to be determined under New York law. *Aquilino v. United States*, 363 U.S. 509. In making that determination, the courts below properly followed the decision of this Court in *Commissioner v. Estate of Bosch*, *supra*, by giving proper regard to the ruling of the Surrogate's Court but nevertheless concluding that that ruling was not controlling. The Surrogate's Court was without jurisdiction over the United States, and its announced ruling was *ex parte*. See *United States v. Sherwood*, 312 U.S. 584. Moreover, the decisions of the New York Court of Appeals in *Matter of Sand v. Beach*, 276 N.Y. 281, and *Collister v. Fassitt*, 163 N.Y. 281, establish that a beneficiary such as Doran may compel payments to himself despite the discretion accorded to the trustee, and therefore that Doran had a property interest in the trust. Indeed, the New York Court of Appeals has held that the beneficiary's power to compel payment constitutes a property interest subject to federal tax lien. See *Matter of Rosenberg*, 269 N.Y. 247.

2. At all events, this case presents a question of state law that does not warrant further review by this Court. See, e.g., *Huddleston v. Dwyer*, 322 U.S. 232, 237; *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.